

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF PUBLIC SAFETY
ALCOHOL & GAMBLING ENFORCEMENT DIVISION

In the Matter of a Civil Penalty Imposed on JSDL Enterprises, LLC, d/b/a Carbone's Pizza & Pub	FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION
--	---

This matter came on for hearing before Administrative Law Judge Kathleen D. Sheehy (ALJ) on December 18, 2009, at the Office of Administrative Hearings, in St. Paul, Minnesota. The OAH hearing record closed on December 25, 2009, upon receipt of the parties' closing letter briefs.

David J. Koob, Assistant Attorney General, 445 Minnesota Street, Suite 1800, St. Paul, MN 55101, appeared on behalf of the Department of Public Safety (DPS or Department).

James S. Carlson, Attorney at Law, Carlson Law Office, Inc., 740 Southcross Drive West, Suite 105, Burnsville, MN 55306, appeared on behalf of JSDL Enterprises, LLC, d/b/a Carbone's Pizza & Pub (Carbone's or Respondent).

STATEMENT OF THE ISSUE

Did Carbone's serve alcohol to an obviously intoxicated person on May 17, 2009, in violation of Minn. Stat. § 340A.502?

The ALJ concludes that the Department proved by a preponderance of the evidence that Carbone's served alcohol to an obviously intoxicated person on May 17, 2009, in violation of Minn. Stat. § 340A.502.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Carbone's is a casual pub-style restaurant located in Rosemount, Minnesota. The restaurant has a full bar.

2. One of the services Carbone's provides is free transportation home on the "Carbone's bus" for any patron who wants a ride home at the end of the night.¹

3. On Saturday, May 16, 2009, the DPS Alcohol and Gambling Enforcement Division (AGED) conducted a Retail Alcohol Vendor Enforcement (RAVE) visit to Carbone's. RAVE is a DPS program focusing on educating liquor licensees to prevent service of alcoholic beverages to obviously intoxicated persons. Its purpose is to reduce the number of alcohol-related traffic offenses caused by impaired drivers. RAVE visits are usually conducted on Friday and Saturday nights in coordination with Safe & Sober DWI enforcement programs conducted by the State Patrol and county and local law enforcement agencies.²

4. Typically, DPS/AGED agents work in teams of two and visit licensed liquor establishments at random. The teams are usually made up of one DPS special agent, who is a licensed peace officer, and one DPS special investigator. Together they observe the clientele at bars and restaurants to see whether persons who appear to be obviously intoxicated are served alcoholic beverages. The agents also distribute educational packets to the owners or managers of the establishments that include a letter from the DPS explaining the RAVE program and identifying the governing Minnesota statutes.³

5. Special Agent Douglas Forsman has been a licensed peace officer since 1982 and has worked for DPS/AGED for approximately 11 years. Special Agent Forsman's duties include performing compliance checks on licensed liquor establishments and investigating alleged violations of alcohol sales regulations. Special Agent Forsman has had training on how to identify intoxicated individuals both in his position with DPS and as a licensed peace officer. He estimates that he has worked 18 shifts conducting RAVE visits and that he has inspected approximately 142 licensed liquor establishments.⁴

6. Special Investigator Michael Polla has been employed by DPS/AGED since 1986. His duties include conducting pre-license investigations and inspections of liquor establishments in Minnesota. He participates in RAVE visits and assists the special agents in conducting compliance checks of licensed liquor establishments. Investigator Polla estimates that he has worked 33 shifts conducting RAVE investigations and that he has inspected over 300 licensed liquor establishments. Investigator Polla is not a licensed peace officer.⁵

7. At approximately 7:30 p.m. on May 16, 2009, Special Agent Forsman and Special Investigator Mike Polla attended a Safe & Sober program meeting to introduce themselves to the police officers on the DWI task force and to let those officers know that they would be in the Rosemount area conducting RAVE visits at bars. Agent

¹ Testimony of Michael Palumbo.

² Testimony of Douglas Forsman; Ex. 1.

³ Testimony of Forsman.

⁴ Testimony of Forsman.

⁵ Testimony of Polla.

Forsman and Investigator Polla also requested that the officers inform them if any persons arrested for DWI had been drinking at bars in the area, so that the Department could send a letter to those establishments reminding them of their obligation not to serve obviously intoxicated patrons.⁶

8. At a little after midnight on May 17, 2009, Agent Forsman and Investigator Polla went to Carbone's in Rosemount. They had already visited five or six other bars in Rosemount before arriving at Carbone's. They entered Carbone's through the front door and were greeted by a bar employee, who asked to see their identification. After they showed the employee their driver's licenses, they walked through the bar to the area by the back door. There were approximately 20 people in the bar, with a group of people gathered around one table. It was a fairly quiet crowd, and Agent Forsman and Investigator Polla did not observe any behavior that was out of the ordinary or of concern. After standing by the bar for about five minutes, Agent Forsman and Investigator Polla decided to walk next door to another bar located about 50 feet from Carbone's back door.

9. The other bar was even quieter than Carbone's. After staying for about five or ten minutes, Agent Forsman and Investigator Polla decided they would return to Carbone's, and if they did not see any potential violations they would move on to another licensed location.⁷

10. Agent Forsman and Investigator Polla returned to Carbone's by the back door and went up to the bar. They looked around the crowd and observed a patron who appeared to be intoxicated, standing with a mixed drink tumbler in his hand. The patron had poor balance, was swaying slightly, his eyes were watery, and his speech was animated and slurred. Agent Forsman conferred with Investigator Polla and they both agreed that the patron appeared intoxicated. Agent Forsman and Investigator Polla took a seat at the far end of the bar, and they each ordered a beer. They continued to look around the bar and observe the patron, who was approximately 15 feet away from them. The patron went outside to smoke a cigarette and then returned to the bar. It appeared he tried to order a drink from someone at the opposite end of the bar who either turned him down or directed him to the end of the bar where Agent Forsman and Investigator Polla were seated. The patron then approached the end of the bar near Forsman and Polla and ordered a "Crown and Coke" mixed drink from Melanie Silver, a manager at Carbone's who was helping out behind the bar that evening. While Ms. Silver mixed the drink, the patron stood by the bar swaying slightly. Ms. Silver served the patron the drink and, once he had paid for it, the patron began to drink it.⁸

11. When Agent Forsman saw the patron begin to consume the alcoholic beverage, he introduced himself to the patron, showed him his badge, and explained that he was conducting a RAVE investigation of the bar for the DPS. Agent Forsman asked the patron how much he had had to drink and asked to see his driver's license.

⁶ Testimony of Forsman.

⁷ Testimony of Forsman.

⁸ Testimony of Forsman. (Crown and Coke is a mixed drink containing whiskey and cola.)

The patron told Agent Forsman that he was willing to cooperate. He showed Agent Forsman his driver's license, and he stated that he had had a couple Crown and Cokes at the bar and a couple of beers before coming to the bar. While they were talking, Agent Forsman smelled the strong odor of an alcoholic beverage on the patron's breath and observed that the patron's eyes were bloodshot and watery, his face was flushed, and his speech was slightly slurred. Agent Forsman concluded that the patron was obviously intoxicated and should not have been served the last alcoholic beverage.⁹

12. While Agent Forsman was talking with the patron, Investigator Polla identified himself to Ms. Silver, showed her his badge, and told her that he believed she had served an obviously intoxicated person in violation of the law. When he said this, Ms. Silver reached for the patron's drink, which had been sitting on the bar, and placed it behind the bar. Investigator Polla asked to see Ms. Silver's driver's license in order to document who made the sale of the alcoholic beverage.¹⁰

13. Other people in the bar began to gather around Agent Forsman and the patron, and one of them strongly suggested that the patron should be offered a preliminary breath test (PBT). Eventually, Agent Forsman called the Rosemount police department and requested that they send an officer to Carbone's with the equipment necessary to administer a PBT. Agent Forsman explained to the dispatcher that he had a violation for "over service" at Carbone's.¹¹

14. Seeing the people gathered around Agent Forsman, and concerned that the situation might get out of control, Investigator Polla also called the Rosemount police department and requested a police officer for backup protection. While he was still on the phone with dispatch, Sergeant Bryan Burkhalter of the Rosemount Police Department arrived at Carbone's with the PBT. Sergeant Burkhalter approached the group that had gathered around Agent Forsman and the patron. After observing the patron's watery eyes, "droopy" posture, slow reactions, and slurred speech, Sergeant Burkhalter concluded that the patron was obviously intoxicated. He offered to administer the PBT, but at this point the patron declined to take the test.¹² Agent Forsman and Investigator then left the premises.

15. In a letter dated May 18, 2009, Agent Forsman notified Carbone's owners that DPS/AGED had conducted a RAVE visit at their bar and observed one of Carbone's employees serve an alcoholic beverage to an obviously intoxicated male patron. After citing Minnesota Statutes § 350A.502, which prohibits the sale of alcoholic beverages to obviously intoxicated persons, Agent Forsman advised the owners that a report on the incident would be forwarded to DPS/AGED Assistant Director Marlene Kjelsberg and that Carbone's might be assessed administrative penalties.¹³

⁹ Testimony of Forsman.

¹⁰ Testimony of Polla.

¹¹ Testimony of Forsman and Bryan Burkhalter.

¹² Testimony of Burkhalter.

¹³ Ex. 1.

16. By letter dated June 11, 2009, the Commissioner of DPS notified Carbone's that it was in violation of Minn. Stat. § 340A.502 for selling alcohol to an obviously intoxicated person and imposed a \$200 civil penalty for the violation.

17. By letter dated June 25, 2009, Carbone's, through its counsel, denied violating Minn. Stat. § 340A.502 and requested a hearing to appeal the imposition of the \$200 civil penalty.

18. On November 12, 2009, the Department issued a Notice and Order for Hearing in this matter. The hearing took place at the Office of Administrative Hearings on December 18, 2009.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Department of Public Safety have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50, 14.57, and 340A.415.

2. The Respondent was given timely and proper notice of the hearing in this matter.

3. The Department of Public Safety has complied with all relevant substantive and procedural requirements of law and rule.

3. Minn. Stat. § 340A.502 prohibits any person from selling, giving, furnishing or in any way procuring "for another alcoholic beverages for the use of an obviously intoxicated person."

4. Minn. Stat. § 340A.415 states in pertinent part:

340A.415 License revocation or suspension; civil penalty.

On a finding that the license or permit holder has ... (5) failed to comply with an applicable statute, rule, or ordinance relating to alcoholic beverages, the commissioner ... may revoke the license or permit, suspend the license or permit for up to 60 days, impose a civil penalty of up to \$2,000 for each violation, or impose any combination of these sanctions. No suspension or revocation takes effect until the license or permit holder has been given an opportunity for a hearing under sections 14.57 to 14.69 of the Administrative Procedure Act. ...

5. The Department proved by a preponderance of the evidence that the Respondent sold an alcoholic beverage to an obviously intoxicated person in the early morning hours of May 17, 2009, in violation of Minn. Stat. § 340A.502.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the Commissioner of Public Safety affirm the civil penalty of \$200 imposed for Respondent's violation of Minn. Stat. § 340A.502.

Dated: January 14, 2010

s/Kathleen D. Sheehy
KATHLEEN D. SHEEHY
Administrative Law Judge

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Public Safety (the Commissioner) will make the final decision after a review of the record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. The parties have 10 calendar days after receiving this report to file Exceptions to the report. At the end of the exceptions period, the record will close. The Commissioner then has 10 working days to issue his final decision. Parties should contact Michael Campion, Commissioner of Public Safety, 444 Cedar Street, Saint Paul, Minnesota 55101, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minnesota Statutes § 14.62 (2a). The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minnesota Statutes § 14.62 (1), the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The standard for determining whether a person is "obviously intoxicated" is "whether exercising reasonable powers of observation, one sees or should see that the buyer is intoxicated."¹⁴ The word "obviously" has been defined as "that which is easily discovered or seen or understood, or such as is readily perceived by the eye or the intellect, or that which is plain or evident."¹⁵ A finding of obvious intoxication does not

¹⁴ *Jewett v. Deutsch*, 437 N.W.2d 717 (Minn. App. 1989); see also *Strand v. Village of Watson*, 245 Minn. 414, 422, 72 N.W.2d 609, 615 (1955)..

¹⁵ *Ritter v. Village of Appleton*, 254 Minn. 30, 37, 93 N.W.2d 683, 687 (Minn. 1958).

require proof of any specified amount of drinking or any specific degree or level of intoxication.¹⁶

Special Agent Forsman and Investigator Polla both testified that the patron exhibited behavior just before ordering a mixed alcoholic beverage that should have caused the bartender, using reasonable powers of observation, to conclude that the patron was intoxicated. According to their testimony, the patron was flushed in the face, had poor balance, swayed while standing, slurred his speech, had watery blood-shot eyes, and talked loudly. A few minutes later, Sergeant Burkhalter observed the patron and also concluded, based on his watery eyes, “droopy” posture, and slurred speech, that he appeared intoxicated. Both Agent Forsman and Sergeant Burkhalter are licensed peace officers who have received training in identifying intoxicated individuals.

The testimony of Agent Forsman and Investigator Polla is supported by other record evidence as well. It was a Saturday night. The patron in question was a “regular” patron at Carbone’s. He went to Carbone’s, having planned in advance to take the Carbone’s bus home. The patron admitted to Agent Forsman that he had been drinking beer before coming to the bar and had consumed a couple of Crown and Cokes while at the bar.

The Respondent presented testimony from Carbone’s bouncer, bartender, and manager, and from the patron’s friend who met him there that evening. They all testified that the patron was not obviously intoxicated. The bouncer testified that the patron’s speech was not slurred and he had no difficulty walking when he entered the bar. The bouncer also said he had transferred many drunks to detoxification centers in connection with his employment as a paramedic, and in his view the patron was not drunk. This testimony suggests that the bouncer might be equating “obvious intoxication” with the degree of intoxication necessary to justify admission to a medical detoxification center.

It is unclear how long the patron was actually there or how many drinks the patron had after entering Carbone’s. The testimony of the Respondent’s employees is vague on these issues. The bartender said she talked to the patron “throughout the evening” but could not remember how long he was there or whether she had served him any drinks. The manager who acknowledged serving the patron one mixed drink testified that he did not appear intoxicated at the time she served him; however, she admitted that she could lose her job for having served an intoxicated customer. She also testified that she had seen the patron before on a number of occasions when he was obviously intoxicated, but that this had happened in other establishments where she happened to be a customer. This testimony strikes the ALJ as unlikely.

Finally, the patron’s good friend testified that the patron did not appear intoxicated. But his friend also acknowledged having consumed alcohol that evening, beginning with dinner at about 8:30 p.m. at an Applebee’s and ending when he and the patron took the bus home from Carbone’s. He maintained he had one drink at

¹⁶ *Strand v. Village of Watson*, 245 Minn. 414, 72 N.W.2d 609 (Minn. 1963).

Applebee's and two drinks after arriving at Carbone's. But the dinner was a celebration of his wedding anniversary, and he and his wife took a cab from Applebee's to Carbone's. The ALJ does not believe the patron's friend was truthful about the amount of alcohol he had consumed before coming to Carbone's.¹⁷

All of the witnesses in this case had some potential for bias with regard to their reporting of these events. The Department's witnesses testified consistently with each other and with other record evidence, including the patron's own statements. The Administrative Law Judge has concluded that this testimony is more reliable than that presented by the Respondent. The Department has demonstrated that it is more likely than not that Respondent served an alcoholic beverage to an obviously intoxicated person at Carbone's in the early morning hours of May 17, 2009. The Administrative Law Judge accordingly recommends that the \$200 civil penalty be affirmed.

K.D.S.

17